Supreme Court, U.S.
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No. 95-628

In The

# Supreme Court of the United States

October Term, 1995

BONNIE C. SABIA, et al.,

*Petitioners,*

vs.

SEMINOLE COUNTY, FLORIDA, et al.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JULIUS F. PARKER, JR.
Counsel of Record
JENNIFER PARKER LAVIA
THE PARKER LAW FIRM
2804 Remington Green Circle
Post Office Box 14436
Tallahassee, FL 32317-4436
(904) 385-4454

*Attorneys for Respondents, Eslinger, McGill, Blount and Fauls*

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## QUESTIONS PRESENTED FOR REVIEW

IN EVALUATING CLAIMS BY JUVENILE PRETRIAL DETAINEES THAT THE ACTIONS OF THE INDIVIDUAL DEFENDANTS CONSTITUTED DELIBERATE INDIFFERENCE IN VIOLATION OF THE DETAINEE'S FOURTEENTH AMENDMENT RIGHTS AS A PRETRIAL DETAINEE, DOES THE EIGHTH AMENDMENT DELIBERATE INDIFFERENCE STANDARD APPLY, OR A MORE PROTECTIVE STANDARD BASED EITHER ON THE DUE PROCESS CLAUSE OR THE FOURTH AMENDMENT?

GIVEN THAT THE EIGHTH AMENDMENT PROTECTS CONVICTED PRISONERS FROM ONLY THAT DEGREE OF PUNISHMENT THAT CAN BE CHARACTERIZED AS CRUEL AND UNUSUAL, SHOULD THE EIGHTH AMENDMENT DELIBERATE INDIFFERENCE STANDARD APPLY WITHOUT MODIFICATION TO JAIL SUICIDE CASES, INVOLVING ACCUSED JUVENILE CITIZENS DETAINED PENDING TRIAL WHO ARE ENTITLED TO A PRESUMPTION OF INNOCENCE AND WHO, UNLIKE CONVICTED PRISONERS, MAY NOT BE PUNISHED?

IN REGARD TO THE ESTATE OF A PRETRIAL DETAINEE IN A JAIL SUICIDE CASE OCCURRING IN A COUNTY JAIL, IS A CLAIM OF MUNICIPAL LIABILITY LIMITED TO THE SHERIFF ADMINISTERING THE JAIL, OR IS THE COUNTY PROPERLY NAMED AS WELL?

**QUESTIONS PRESENTED FOR REVIEW** – Continued

IN EVALUATING CLAIMS BY JUVENILE PRETRIAL DETAINEES THAT THE ACTIONS OF THE INDIVIDUAL DEFENDANTS AND COUNTY JAIL CONSTITUTED DELIBERATE INDIFFERENCE IN VIOLATION OF THE DETAINEE'S FOURTEENTH AMENDMENT RIGHTS AS A PRETRIAL DETAINEE, CAN APPELLATE COURTS SUBSTITUTE THEIR FINDINGS OF FACT FOR DISPUTED FACTS OF RECORD TO FORM A BASIS FOR AFFIRMING THE GRANTING OF A MOTION FOR SUMMARY JUDGMENT?

# TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW ..... i

TABLE OF AUTHORITIES ..... iv

STATEMENT OF THE CASE ..... 1

REASONS TO DENY THE WRIT ..... 2

THE WRIT SHOULD BE DENIED BECAUSE THE QUESTIONS PRESENTED FOR REVIEW WERE NOT PRESSED OR PASSED UPON BELOW .... 2

A. THE QUESTION PRESENTED IN THE PETITION WAS NOT PRESSED BELOW ..... 3

B. THE QUESTIONS PRESENTED FOR REVIEW WERE NOT PASSED ON BY THE COURT BELOW ..... 4

CONCLUSION ..... 7

# TABLE OF AUTHORITIES

Page

CASES

*City of Canton v. Harris*, 489 U.S. 378 (1989) ..... 7

*Duignan v. United States*, 274 U.S. 195 (1927) ..... 3

*Illinois v. Gates*, 462 U.S. 213 (1983) ..... 6

*United States v. Williams*, 504 U.S. 36 (1992) ..... 3

STATUTES, RULES AND REGULATIONS

42 U.S.C. § 1983 ..... 5

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Donald Eslinger, Sheriff of Seminole County, Florida, Richard Blount, Douglas Fauls and Matthew McGill, respectfully request that this Court deny the Petition for Writ of Certiorari which seeks review of the Eleventh Circuit's opinion below. That unreported opinion is reprinted in the Petition in Appendix A.

## STATEMENT OF THE CASE

Respondents accept Petitioners' statement of the case except as follows:

Petitioners assert that the district court "substitut[ed] the findings of fact of the Appellate Court for the disputed facts of record" in granting summary judgment in favor of defendants. Petition for Writ of Certiorari at 11-12. Petitioners' assertion is that disputed issues of fact existed regarding the issue of notice of Mr. Bateman's suicidal tendencies and the fifteen minute checks. However, for purposes of granting the defense motion for summary judgment, the district court assumed, without deciding, that Defendants had notice. Petition for Writ of Certiorari at A17-18. Therefore, the district court did not make any findings of fact on the issue of notice.

As to the issue of fifteen minute checks, Petitioners do not identify the source of any disputed facts. Petitioners simply assert that "the record reflects a genuine dispute over the matter of fifteen minute checks." Petition for Writ of Certiorari at 14. The district court stated that "the Court of Appeals found on page 7 of its decision

that the record shows the decedent 'was checked every fifteen minutes as per regulations' governing the incarceration of juveniles." Petition for Writ of Certiorari at A17. Petitioners have not pointed to any evidence to the contrary; therefore, this Court should reject the unsupported contention that any factual disputes exist.

## REASONS TO DENY THE WRIT

### THE WRIT SHOULD BE DENIED BECAUSE THE QUESTIONS PRESENTED FOR REVIEW WERE NOT PRESSED OR PASSED UPON BELOW

Petitioners present four questions for review. However, only two of these questions are actually addressed in Petitioners' argument. These two questions are related and will be addressed together herein:

> 1. IN EVALUATING CLAIMS BY JUVENILE PRETRIAL DETAINEES THAT THE ACTIONS OF THE INDIVIDUAL DEFENDANTS CONSTITUTED DELIBERATE INDIFFERENCE IN VIOLATION OF THE DETAINEE'S FOURTEENTH AMENDMENT RIGHTS AS A PRETRIAL DETAINEE, DOES THE EIGHTH AMENDMENT DELIBERATE INDIFFERENCE STANDARD APPLY, OR A MORE PROTECTIVE STANDARD BASED EITHER ON THE DUE PROCESS CLAUSE OR THE FOURTH AMENDMENT?
>
> 2. GIVEN THAT THE EIGHTH AMENDMENT PROTECTS CONVICTED PRISONERS FROM ONLY THAT DEGREE OF PUNISHMENT THAT CAN BE CHARACTERIZED AS CRUEL AND UNUSUAL, SHOULD THE

EIGHTH AMENDMENT DELIBERATE INDIFFERENCE STANDARD APPLY WITHOUT MODIFICATION TO JAIL SUICIDE CASES, INVOLVING ACCUSED JUVENILE CITIZENS DETAINED PENDING TRIAL WHO ARE ENTITLED TO A PRESUMPTION OF INNOCENCE AND WHO, UNLIKE CONVICTED PRISONERS, MAY NOT BE PUNISHED?

This Court should deny the Petition for Writ of Certiorari because the questions presented for review were not "pressed or passed upon below". *Duignan v. United States*, 274 U.S. 195, 200 (1927). This Court has emphasized that the rule is stated in the disjunctive, that is, that the Court may address a question that was *either* pressed *or* passed upon below. *United States v. Williams*, 504 U.S. 36, 41 (1992). Thus, Respondents will address each half of the test in turn.

## A. THE QUESTION PRESENTED IN THE PETITION WAS NOT PRESSED BELOW

Most easily dispensed with is the issue of whether the question presented was "pressed" below. Clearly, Petitioners never even raised the issue of whether the applicable standard was deliberate indifference or some less stringent standard. In fact, it is quite apparent that Petitioners assumed, without argument, that the appropriate standard was deliberate indifference. Petitioners' brief to the Eleventh Circuit contains no argument that the standard should be anything other than deliberate indifference. Respondents have included the relevant portion of Petitioners' brief below in the Appendix

hereto. The Initial Brief of Appellants contained the following: "Argument III: Appellants Have Demonstrated that Their Deliberate Indifference Claim Should Be Presented to a Jury." Appendix 2. Petitioners argued as follows: "All three sets of defendants argue that the plaintiffs cannot survive summary judgment on their claim that the defendants were deliberately indifferent to Mr. Bateman's serious mental health needs. Authority from this court, however, indicates unequivocally that the facts of this case support a jury finding of deliberate indifference." Appendix 2. Petitioners then discuss the cases which hold that the standard is deliberate indifference and conclude, "Plaintiffs have satisfied the burden of demonstrating that the existence of deliberate indifference in this case is at [sic] question for the jury." Appendix 9. In fact, even in the Petition for Writ of Certiorari, Petitioners state that "A genuine issue of fact exists on the central issue of whether the 'Sheriff's Officer defendants' were deliberately indifferent to Mr. Bateman's serious psychological needs." Petition for Writ of Certiorari at 13-14.

Thus, it is clear that Petitioners did not "press" the issue below. Nevertheless, this Court could decide the questions presented if they were "passed on" by the court below.

### B. THE QUESTIONS PRESENTED FOR REVIEW WERE NOT PASSED ON BY THE COURT BELOW

The opinion of the Eleventh Circuit in its entirety was as follows:

> In August 1987, Edwin Bateman, a juvenile, committed suicide in the Seminole County Jail while awaiting trial for armed robbery and murder. Bonnie C. Sabia, individually and as administratrix of the estate of Edwin Bateman, and Margaret Carrow, individually and as natural mother of Edwin Bateman, (collectively, "Appellants") brought this action under 42 U.S.C. § 1983 against various defendants. As a result of prior rulings, the only remaining defendants in this case are Matthew McGill, Richard Blount, Douglas Fauls, and Donald Eslinger, in their official capacities, and Seminole County (collectively, "Appellees"). This appeal is from the district court's grant of summary judgment for Appellees in June 1994.
>
> Appellants contend that summary judgment was inappropriate because (1) Appellees failed to sustain their burden of production in moving for summary judgment, (2) there is a genuine issue of fact as to whether the actions of the individual defendants constituted deliberate indifference in violation of Bateman's Fifth Amendment rights as a pretrial detainee, (3) the alleged constitutional violation stemmed from the policies of Seminole County, and (4) the grant of summary judgment violated the law of the case as established by the district court's prior denial of summary judgment for Appellees. After reviewing the records, we conclude that Appellants' contentions are without merit.
>
> AFFIRMED.

The Eleventh Circuit never addressed the issue of the appropriate standard in § 1983 cases involving jail suicides of pretrial detainees.

Even assuming that the Eleventh Circuit applied the deliberate indifference standard, this Court should deny the Petition for Writ of Certiorari. In *Illinois v. Gates*, 462 U.S. 213 (1983), this Court considered addressing the question of whether the exclusionary rule should be modified. This Court decided not to decide the issue because it had not been pressed or passed upon in the court below. *Id.* at 217. The court below had applied the exclusionary rule as it existed. *Id.* at 222. This Court held that mere application of an existing rule without any real contest on the issue did not satisfy the "pressed or passed upon below" rule. *Id.* at 222-23. This Court then discussed the importance of the rule:

> Where difficult issues of great public importance are involved, there are strong reasons to adhere scrupulously to the customary limitations on our discretion. By doing so we "promote respect . . . for the Court's adjudicatory process [and] the stability of [our] decisions." Moreover, fidelity to the rule guarantees that a factual record will be available to us, thereby discouraging the framing of broad rules, seemingly sensible in one set of facts, which may prove ill-considered in other circumstances. In Justice Harlan's words, adherence to the rule lessens the threat of "untoward political ramifications" not foreseen at the time of our decision. . . . By following this course, we promote respect of the procedures by which our decisions are rendered, as well as confidence in the stability of prior decisions.

*Id.* at 224.

## CONCLUSION

The question presented by Petitioners and left open by this Court in *City of Canton v. Harris*, 489 U.S. 378 (1989) is an important question and the conflict among the circuits does merit resolution. However, this case does not provide the appropriate vehicle for such resolution because the question was not pressed or passed upon below. It is precisely because of the importance of the issue that its resolution must await another day and a fully developed record. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JULIUS F. PARKER, JR.
JENNIFER PARKER LAVIA
THE PARKER LAW FIRM
2804 Remington Green Circle
Post Office Box 14436
Tallahassee, FL 32317-4436
(904) 385-4454

*Attorneys for Respondents,*
*Eslinger, McGill,*
*Blount and Fauls*

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## APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

## INDEX TO APPENDIX

Page

EXCERPTS OF INITIAL BRIEF OF PETITIONERS. . App. 1

App. 1

**UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

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DOCKET NO. 94-2850

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**BONNIE C. SABIA,** individually and as Administratrix of the Estate of Edwin P. Bateman; and **MARGARET CARROW,** individually and as natural mother of Edwin P. Bateman,

Plaintiffs - Appellants,

vs.

**SEMINOLE COUNTY, FLORIDA; MATTHEW McGILL, RICHARD BLOUNT,** and **DOUGLAS FAULS,** in their official capacity of Guards at the Seminole County Jail; and **DONALD ESLINGER,** in his official capacity as successor to John E. Polk, Sheriff and Supervisor of the guards,

Defendant - Appellees.

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On Appeal from the United States District Court
for the Middle District of Florida
Orlando Division

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# INITIAL BRIEF OF APPELLANTS

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Rodney G. Gregory
Law Office of
Rodney G. Gregory
3900 Atlantic Boulevard
Jacksonville, Florida 32202
(904) 398-0012

Matthew P. Farmer
Farmer & Fitzgerald, P.A.
708 E. Jackson Street
Tampa, Florida 33602
(813) 228-0095

COUNSEL FOR APPELLANTS

* * *

## ARGUMENT III

### APPELLANTS HAVE DEMONSTRATED THAT THEIR DELIBERATE INDIFFERENCE CLAIM SHOULD BE PRESENTED TO A JURY

All three sets of defendants argue that the plaintiffs cannot survive summary judgment on their claim that the defendants were deliberately indifferent to Mr. Bateman's serious mental health needs. Authority from this court, however, indicates unequivocally that the facts of this case support a jury finding of deliberate indifference. (The Center defendants rely on *Howell v. Evans*, 922 F. 2d 712 (11th Cir.), which this court has since vacated.)

This court has had three recent occasions to address the pertinent legal standard regarding liability under 42 U.S.C. Section 1983 for suicides committed by pretrial detainees.

In *Edwards v. Gilbert*, 867 F. 2d 1271 (11th Cir. 1989), the court adopted the following standard:

> In a prisoner suicide case, to prevail under Section 1983 for violation of substantive rights, under either the eighth or fourteenth amendment, the plaintiff must show that the jail officer displayed "deliberate indifference" to the prisoner's taking of his own life.

*Id.* at 1274-75. The decedent in Edwards had been convicted, and was placed in a county jail to await sentencing. *Id.* at 1272. In the words of the Court, he "had never threatened or attempted suicide before his successful attempt." *Id.*

The *Edwards* court then observed that "[in the absence of a previous threat of or an earlier attempt to suicide, we know of no federal court in the nation or any other court within this circuit that has concluded that official conduct in failing to prevent a suicide constitutes deliberate indifference." *Id.* at 1275. *Edwards* concluded that no liability existed. The court, however, went on to describe a number of relevant factors not present in *Edwards* but, quite significantly, present in this case. For instance, the court observed that "[in this case, before [the prisoner's] death there was no mention by [him] *or anyone else* of suicidal tendencies." *Id.* (emphasis added). In sharp contrast, this case is replete with evidence that defendants were directly and explicitly apprised of Mr. Bateman's suicidal propensity. The *Edwards* court also acknowledged that "there was no evidence of unusual behavior." *Id.* Again, the facts of this case present a dramatic contrast. Finally, in finding that the defendants were entitled to qualified immunity, the *Edwards* court held:

> Because no court had ever held that acts materially similar to what these defendants did – leave a seemingly sleeping juvenile inmate, who had never threatened or attempted suicide and *who had never been considered a suicide risk,* in a secure cell for forty-five minutes with another sleeping juvenile – constituted deliberate indifference to the inmate's safety from self harm, we believe that a reasonable officer in each of the defendants' positions could have believed that he was acting consistently with the Constitution.

*Id.* at 1277 (emphasis added). The *Edwards* court, then, endorses a standard applying three different tests in determining whether liability exists for the commission of a suicide: whether officers knew that suicide was "attempted"; whether officers knew that suicide was "threatened ; or whether the inmate "had been . . . considered a risk."

The Eleventh Circuit returned to the question of jail suicide in *Popham v. City of Talladega*, 908 F. 2d 1561 (11th Cir. 1990). The *Popham* court expressly adopted the *Edwards* standard, observing, despite the fact that the decedent was a pretrial detainee (in contrast to the *Edwards* decedent, who had been convicted), that " 'deliberate indifference' to the prisoner's taking of his own life must be displayed." *Id.* at 1563. Like *Edwards*, the *Popham* court recognized as well that "[the standard requires a strong likelihood rather than a mere possibility that the self-infliction of harm will occur. . . . " *Id.*

The *Popham* court explained, in a particularly pertinent passage, that,

> In the context of jail suicides, an allegation of deliberate indifference must be considered in light of *the level of knowledge possessed by the officials involved, or that which they should have known, as to an inmate's suicidal tendencies.*

*Id.* at 1564 (emphasis added). Concluding that the particular jail officials did not possess sufficient knowledge, the court observed:

> The fact that he attempted to commit suicide two days earlier was unknown to the officials who arrested him and placed him in a holding cell. *When plaintiff visited her husband*

> *earlier in the evening, she failed to give police officers and jail officials notice of her husband's recent attempted suicide, which further permitted officials to be without the slightest suspicion that Popham might attempt to take his own life.* Some form of knowledge of the danger is required to support a Section 1983 action.
>
> The officials did not know that Popham threatened suicide from his jail cell. This threat was overheard and discounted as "drunk talk" by an old acquaintance of Popham's who occupied a nearby cell that evening. He made no attempt to notify authorities.

*Id.* (emphasis added). Because plaintiff in *Popham* failed to demonstrate any of the factors reflecting deliberate indifference, most importantly defendants' *knowledge* of the decedent's suicidal tendencies, the *Popham* court affirmed the district court's grant of summary judgment in favor of defendants.

In the third case of trilogy, however, this court, in *Greason v. Kemp*, 891 F. 2d 829 (11th Cir. 1990), found that defendants were not entitled to qualified immunity from liability for a prisoner's suicide. In *Greason*, the inmate was incarcerated at the Georgia Diagnostic and Classification Center for mental health evaluation and treatment. He was monitored both by the Center's psychiatrist, Dr. Fodor, as well as by his immediate subordinate, the mental health team leader, Mr. Brown. *Id.* at 832. These individuals discontinued Greason's antidepression medication. *Id.* When visited by his parents, however, Greason informed them that he had attempted suicide as a result of the discontinuance of the medication. *Id.* at 832. According to the *Greason* court:

> [The parents] meet with Brown following the visit, told him what their son had said, and urged Brown to have Greason transferred to a hospital, fearing that he might attempt suicide again.
>
> [Brown] told Greason's parents not to worry about their son, that he would "take care of it." Brown, however, did nothing. He neglected to contact Dr. Fodor; consequently, Fodor had no knowledge of Greason's suicide attempt. Brown could have placed Greason on "a suicide watch," a procedure in which suicidal inmates are placed in stripped cells and subjected to around-the-clock observation, but he made no effort to have Greason monitored.

*Id.* at 832-33. Greason hung himself twenty-four days later.

Addressing the conduct of Brown, the mental health team leader, the *Greason* court reasoned:

> The question here is a narrow one: whether Brown's failure to monitor Greason *after having been warned by Greason's parents and two inmates that Greason had tried to commit suicide* constituted deliberate indifference.
>
> Where prison personnel directly responsible for inmate care have knowledge that an inmate has attempted, or even threatened suicide, their failure to take steps to prevent that inmate from committing suicide can amount to deliberate indifference.

*Id.* at 835-36 (emphasis added). The court concluded that the district court's refusal to extend qualified immunity to Brown was appropriate.

Other courts have recognized the existence of the constitutional right to be free from deliberate indifference to a detainee's suicidal propensity. In *Partridge v. Two Unknown Police Officers of Houston*, 791 F. 2d 1182 (5th Cir. 1986), for instance, the court found that the "deliberate indifference" standard would create liability for defendants affording inadequate custodial care "of an inmate who might harm himself." *Id.* at 1187, in 20. In other words, the state's duty to provide medical care suggests that "liability under Section 1983 will lie under some circumstances even if the detainee or prisoner died by his own hand rather than the hand of another." *Id.* Similarly, the court in *Colburn v. Upper Darby Township*, 835 F. 2d 663 (3d Cir. 1988), held that:

> Of course we agree that custodial officials cannot be placed in the position of guaranteeing that inmates will not commit suicide. *On the other hand, if such officials know or should know of the particular vulnerability to suicide of an inmate. then the Fourteenth Amendment imposes on them an obligation not to act with reckless indifference to the vulnerability.*

*Id.* at 669 (emphasis added).

In *Buffington v. Baltimore County, Maryland*, 913 F. 2d 113 (4th Cir. 1990), the Fourth Circuit recently followed the general holding of *Greason* and distinguished a number of cases on which defendants rely. According to *Buffington*,

> [We have recently recognized that where police know that a pretrial detainee is on the verge of suicide, that psychological condition can constitute the kind of serious medical need to which

state officials must, under the due process clause, not be deliberately indifferent. In *Belcher v. Oliver*, 898 F. 2d 32 (4th Cir. 1990), we found no due process violation where a pretrial detainee hung himself with his belt after police officers placed him in a jail without removing his belt or shoes. Because the plaintiff in *Belcher* had presented "no objective evidence that [he] even had a serious need for such attention . . . [to] suicidal tendencies," *id.* at 35, we held that he had not stated a claim for violation of his substantive due process rights. In *Belcher*, we declined to impose on the police officers a duty to screen detainees for suicidal tendencies, but we did not imply that officers would have had no constitutional duty at all if they demonstrably knew of had reason to know that a suicide was imminent. Other courts of appeals have recognized this distinction and the viability of a claim for official indifference to known suicidal tendencies. *See Colburn v. Upper Darby Township*, 838 F. 2d 663, 669 (3d Cir. 1988) ("custodial officials cannot be placed in the position of guaranteeing that inmates will not commit suicide [but] if such officials know or should know of the particular vulnerability to suicide of an inmate," fourteenth amendment imposes duty not to act with "reckless indifference" to the risk); *Danese v. Asman*, 875 F. 2d 1239, 1244 (6th Cir. 1989) (no duty to screen pretrial detainee for suicidal tendencies, but "[the story might be different if the police were certain that [the detainee] would attempt suicide and just ignore it").

*Id.* at 120.

Even courts rejecting claims that officers' deliberate indifference to basic psychological needs resulted in the suicide of a detainee have recognized that, under the facts of this case, the result would have been different. In *Danese v. Asman*, 875 F. 2d 1239 (6th Cir. 1989), for instance, the court reasoned that "[the story might be different *if the police were certain that Danese would attempt suicide and just ignored it, or if Danese had told them he need psychological help.*" *Id.* at 1244 (emphasis added). In *State Bank of St. Charles v. Camic*, 712 F. 2d 1140 (7th Cir. 1983), the court expressly observed that, in removing the decedent's belt and shoelaces, the officials took precautions against the possibility of suicide. *Id.* at 11746 (also recognizing that defendants had no actual knowledge that decedent was a suicide risk). Likewise, the court in *Williams v. Borough of West Chester, Pennsylvania*, 891 F. 2d 458 (3d. Cir. 1989), acknowledged that the officers involved had no actual knowledge of the decedent's suicidal propensity. *Id.* at 465.

Thus, *Edwards* and *Popham* are obviously distinguishable from the facts of this case. Plaintiffs have satisfied the burden of demonstrating that the existence of deliberate indifference in this case is at question for the jury. Prior knowledge of suicidal tendencies is the bright-line rule in the case law. As set out in the Statement of the Case, plaintiffs have provided evidence of several instances of defendants' prior knowledge.

The affidavit of Patrick R. Anderson, Ph.D., also fully supports Appellants' contentions. [R2-177-178] In his summary, Dr. Anderson opinioned that there was

a defacto, unwritten custom of practice in regard to the care and control of juvenile detainees which failed to follow generally accepted practices in the field of American law enforcement and was not in compliance with Florida State law regarding the proper operation of such facilities . . . [R2-177-178]

* * *